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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/822,886

04/13/2004

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4829A(CIP)

4008

27887 7590 03/18/2009
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EXAMINER

ARNOLD, ERNST V

ART UNIT

PAPER NUMBER

1616

MAIL DATE

DELIVERY MODE

03/18/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/822,886	Applicant(s) GLENN ET AL.	
	Examiner ERNST V. ARNOLD	Art Unit 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☐ Claim(s) 1, 3-12, 14-22, 46, 47, 50-54, 59, 60 and 63-73 is/are pending in the application.
- 4a) Of the above claim(s) 12, 14-22, 59, 60 and 63-65 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 3-11, 46, 47, 50-54 and 66-73 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claims 66-73 are new. Claims 2, 13, 24-44, 48 and 61 were previously cancelled. Claims 23, 45, 49, 55-58 and 62 are presently cancelled. Claims 12, 14-22, 59-60 and 63-65 are withdrawn. Applicant's amendment has necessitated a new ground of rejection. Accordingly, this Action is FINAL.

Comment: New claims 70 and 71 find support in [0024] of the PGPUB.

Withdrawn rejections:

Applicant's amendments and arguments filed 10/08/07 are acknowledged and have been fully considered. Any rejection and/or objection not specifically addressed below is herein withdrawn. Claims 1, 3-5, 10, 45-47 and 49-56 were rejected under 35 U.S.C. 102(b) as being anticipated by Levy (US 6,001,382) as evidenced by Ascione (US 5,670,137). Claims 1, 4, 5, 45-47 and 52-54 were rejected under 35 U.S.C. 102(b) as being anticipated by Iijima et al. (US 4,948,589). These rejections are withdrawn in view of Applicant's amendments. Similarly, the 55 U.S.C. 103(a) as being unpatentable over Puterka et al. WO 98/38867 in view of Jackson et al. (US 2,821,500) and Walker (US 6,110,866) and claims 1, 3-11, 45-47 and 49-56 were rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-8 of U.S. Patent No. 6,060,521 in view of Puterka et al. WO 98/38867 and Jackson et al. (US 2,821,500) and Walker (US 6,110,866) are also withdrawn in view of Applicants amendments.

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Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1, 3-11, 46, 47, 50-54, and 66-72 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claim 1 introduces new matter as the claims recites the limitation "a film of thickness between 1 μ and 5 mm". There is no support in the specification for this limitation. The limitation of: "a film of thickness between 1 μ and 5 mm " was not described in the specification as filed, and person skilled in the art would not recognize in the applicant's disclosure a description of the invention as presently claimed. The specification discloses that "the film has a thickness of about 1 μ m or more and about 5 mm or less" in the Abstract but does not describe the instantly claimed limitation. There is no guidance in the specification to select a film of thickness between 1 μ and 5 mm. This is a new concept. Therefore, it is the Examiner's position that the disclosure does not reasonably convey that the inventor had possession of the subject matter of the amendment at the time of filing of the instant application.

Claim 66 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which

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was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claim 66 introduces new matter as the claims recites the limitation "a film thickness between 5 μ and 2 mm" There is no support in the specification for this limitation. The limitation of: "a film thickness between 5 μ and 2 mm" was not described in the specification as filed, and person skilled in the art would not recognize in the applicant's disclosure a description of the invention as presently claimed. The specification discloses in paragraph [0050] of the PG PUB: "In embodiments where the particulate materials coat a substrate, the particulate materials form a coating or film, continuous or intermittent, over the growing medium or unwanted vegetation. In one embodiment, where continuous or present, the coating has a thickness of about 1 μ m or more and about 5 mm or less. In another embodiment, the coating has a thickness of about 5 μ m or more and about 2 mm or less.", but does not describe the instantly claimed limitation. There is no guidance in the specification to select a film thickness between 5 μ and 2 mm. This is a new concept not presented previously. Therefore, it is the Examiner's position that the disclosure does not reasonably convey that the inventor had possession of the subject matter of the amendment at the time of filing of the instant application.

Claim 73 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had

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possession of the claimed invention. Claim 73 introduces new matter as the claims recites the limitation "a film thickness between 5 μ and 5 mm" There is no support in the specification for this limitation. The limitation of: "a film thickness between 5 μ and 5 mm" was not described in the specification as filed, and person skilled in the art would not recognize in the applicant's disclosure a description of the invention as presently claimed. The specification discloses in paragraph [0050] of the PG PUB: "In embodiments where the particulate materials coat a substrate, the particulate materials form a coating or film, continuous or intermittent, over the growing medium or unwanted vegetation. In one embodiment, where continuous or present, the coating has a thickness of about 1 μ m or more and about 5 mm or less. In another embodiment, the coating has a thickness of about 5 μ m or more and about 2 mm or less.", but does not describe the instantly claimed limitation. There is no guidance in the specification to select a film thickness between 5 μ and 5 mm. This is a new concept not presented previously. Therefore, it is the Examiner's position that the disclosure does not reasonably convey that the inventor had possession of the subject matter of the amendment at the time of filing of the instant application.

Claims 1, 3-11, 46, 47, 50-54, and 66-73 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claims 1 and 73 introduce new matter as the claims recites the limitation "or mixtures thereof" and claims

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68 and 69 recite: "or mixture thereof". There is no support in the specification for this limitation. The limitation of: "or mixtures thereof" and "or mixture thereof" was not described in the specification as filed, and person skilled in the art would not recognize in the applicant's disclosure a description of the invention as presently claimed. The specification does not disclose mixtures of the ingredients in the Markush group as originally filed. There is no guidance in the specification to mixtures of the particulate material of claims 1, 68, 69, and 73. These are new concepts. Therefore, it is the Examiner's position that the disclosure does not reasonably convey that the inventor had possession of the subject matter of the amendment at the time of filing of the instant application.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 3-11, 46, 47, 50-54, and 66-73 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 recites "1 μ " and claim 73 recites "5 μ ". It is unclear what applicant intends here since " μ ", which means micro, does not modify anything. It appears to be a typographical error and the claims will be examined as they read on 1 μm , which finds support in the Abstract for

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this interpretation, and 5 μ m. Claims 3-11, 46, 47, 50-54, and 66-72 are rejected as being indefinite because they are dependent on an indefinite base claim.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 3-11, 46, 47, 50-54, and 66-73 are rejected under 35 U.S.C. 103(a) as being unpatentable over Levy (US 6,001,382) in view of Puterka et al. WO 98/38867 and Walker (US 6,110,866) and McAllister et al. (US 5,130,342) as evidenced by Ascione (US 5,670,137).

Applicant claims an agricultural, horticultural, or ornamental crop composition comprising: (a) particulate material selected from the group consisting of talc, kaolin, beneficiated kaolin, bentonites, pyrophyllite, feldspar, chalk, limestone, precipitated calcium carbonate, diatomaceous earth, barites, and calcined calcium carbonate,

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calcined talc, calcined kaolin, baker kaolin, fired kaolin, hydrophobic treated heat treated kaolin, calcined bentonites, calcined clays, calcined pyrophyllite, calcined silica, calcined feldspar, calcined sand, calcined quartz, calcined chalk, calcined limestone, calcined precipitated calcium carbonate, baked calcium carbonate, calcined diatomaceous earth, calcined barites, calcined aluminum trihydrate, calcined pyrogenic silica, and-calcined titanium dioxide, or mixtures thereof, wherein the particulate material has a particle size of about 10 μm or less; (b) an organic high boiling oil; and (c) particulate colored particles different from the particulate material (a), wherein the composition forms a film of thickness between 1 μ and 5 mm disposed over a plant-producing substrate, and wherein the colored particles are present in an amount so that the spectrum of reflected light or heat exchange from the substrate is altered compared to a substrate having a film of particulate material (a) and high boiling oil thereon.

Determination of the scope and content of the prior art

(MPEP 2141.01)

The references of Puterka et al., and Walker are discussed in detail above and those discussions are hereby incorporated by reference.

Levy discloses a composition of matter consisting essentially of about 50-99% by weight of a carrier component such as silicas, hydrophobic silicas, diatomaceous earth, clays, etc... and from about 0.0001-50% by weight of a bioactive agent such as petroleum oils, insecticides, plant growth regulators, herbicides, etc..., from about 1.0-

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50% by weight of plasticizer coating component such as naphthenic hydrocarbons and further comprising a binder and carrier coating agent and at least one additional component to regulate the controlled release of the bioactive agent such as diluents, adjuvants, salts such as NaCl (column 37, line 39), oils, surfactants, UV absorbers, and dyes, for example, in the form of a powder (claims 1-4 and 7-15; see also column 16, line 63 through column 17, line 8). “At least one” reads on at least two in instant claim 10. Petroleum oil is a petroleum based oil. Water and film forming agents are taught in claim 14. Looking to the specification to find which silicas can be used in the invention, Levy discloses Aerosil R972 (calcined pyrogenic silica) in example 2 (column 23 example 2 and column 24, Table 2). Ascione discloses that Aerosil R972 has a particle size of less than 40 nm (column 3, lines 7-10). Levy teaches from about 0.01 to about 0.9 wt. % of an inorganic pigment such as titanium dioxide, or the art known equivalents thereof, and mixtures thereof (column 7, lines 19-22). Therefore, the Examiner reasonably concludes that Levy discloses a composition for agricultural or horticultural use comprising calcined pyrogenic silica of a particle size less than about: 100 microns; 10 microns; 3 microns and 1 micron, an organic non-vegetable non-fuel high boiling oil and a surfactant as well as a salt (NaCl). Claim 1 recites combinations of the carrier component and includes vermiculite (line 49) thus reading on plant growing media of instant claims 55 and 56. Levy discloses various carriers (column 7, lines 1-41). The specification discloses that hydrophobic silica treated with a chlorosilane has an average particle size of about 12 to 30 nm (column 8, lines 37-43) although carriers of any size are envisioned (column 6, lines 47-51).

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Levy discloses that Biodac is a cellulosic paper containing about 47-53 wt% paper fiber, from about 28-34 wt% clay, including **kaolin**, about 14-20 wt% **calcium carbonate** or art known equivalents thereof and from about 0.01 to 0.9 wt% of an inorganic pigment such as **titanium dioxide** (column 7, lines 13-21).

McAllister et al. teach the equivalence of iron oxide and titania (titanium oxide) (claim 18).

Puterka et al. teach compositions for use in methods of protecting surfaces from arthropod infestation (Abstract; page 3, summary of the invention and claims 1-9). The compositions contain particulate materials such as hydrous kaolins and calcined kaolins (page 3, lines 25-30; and page 6, lines 7-30). Puterka et al. teach making the surface hydrophobic with various coatings that are well known in the art such as stearic acid and modified silicone fluids (page 7, line 1 through page 8, line 9). The particle size is below about 10 microns and preferably below 3 microns (page 8, lines 10-14 and page 9, lines 1-5). Slurries are made (page 8, lines 21-27 and page 10, lines 17-19). The composition can be applied to horticulture crops (page 9, lines 15-16). Adjuvants such as nonionic surfactants (plant oil based materials with emulsifiers, polymeric terpenes and nonionic detergents can be incorporated into the aqueous slurry (page 10, lines 21-24 and page 11, lines 3-14). Siloxane treated kaolin is known as Translink® 77 (page 17, lines 14-15 and page 19, lines 9-11). Translink® 77 meets the limitations of (a) and (b) of instant claim 1 because it is kaolin with a siloxane coating which is an organic high boiling oil. Puterka et al. teach a composition on page 17, lines 23-25:

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to 100 gal water. Satintone® 5HB applied 25 pounds material suspended in 100 gal water with the addition of 27oz Ninex® MT-603 and 2 pints Toximul®. These

Satintone® 5HB is taught as being calcined kaolin particle (page 17, lines 15-17).

Ninex® MT-603 is a nonionic surfactant. Puterka et al. establish the equivalence of using Translink® 77 and Satintone® 5HB. Puterka et al. establish compositions of calcined kaolin with surfactants. In other words, Puterka et al. teach compositions of siloxane coated kaolin, a particulate material, which meets the limitations of (a) and (b) of instant claim 1 as explained above, and teach compositions of the particulate material with surfactants, limitation (c) of instant claim 1. The Examiner notes that it is not a far stretch to make a composition of Translink® 77 with a surfactant based on the teachings of Puterka et al. to arrive at the composition of instant claim 1. The composition could be used as a bloom thinning emulsion in the absence of evidence to the contrary.

Walker teaches in claims 4 and 5:

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4. The agricultural composition of claim 1, wherein the fertilizer is ammonium nitrate, ammonium sulfate, ammonium polyphosphate, calcium nitrate, calcium sulfate, diammonium phosphate, triple super phosphate, single super phosphate, lime or limestone, magnesium sulfate, manganese sulfate, monoammonium phosphate, monocalcium phosphate, potassium nitrate, potassium chloride, potassium magnesium sulfate, sulfate of potash, sodium nitrate, sulfur-coated urea, borax, pelleted fertilizers, fertilizers coated for slow release, or mixtures thereof.

5. The agricultural composition of claim 3, wherein the soil additive is diatomaceous earth, calcium sulfate, corn cob particulate, bentonite clay, vermiculite, or combinations of these substances.

Walker clearly establishes various salts and soil additives/plant producing media in agricultural compositions. Obviously, if one adds soil additives the composition is directed to the soil and reads on the limitation of instant claim 67. Limestone is taught by Walker and reads on instant claim 68.

Ascertainment of the difference between the prior art and the claims

(MPEP 2141.02)

1. The difference between the instant application and Levy is that Levy does not expressly teach forming a film of thickness between 1 micron and 5 microns; between 5 microns and 2 mm; or between 5 microns and 5 mm over a plant producing substrate; or the presence of colored particles in an amount so the that spectrum of light or heat exchange is altered.

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2. The difference between the instant application and Levy is that Levy does not expressly teach various calcined clays in the composition. This deficiency in Levy is cured by the teachings of Puterka et al.

3. The difference between the instant application and Levy is that Levy does not expressly teach various colorants including iron oxide in the composition. This deficiency in Levy is cured by the teachings of McAllister et al.

4. The difference between the instant application and Levy is that Levy do not expressly teach various salts in the composition. This deficiency in Levy is cured by the teachings of Walker.

Finding of prima facie obviousness

Rational and Motivation (MPEP 2142-2143)

1. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to form a film of thickness between 1 micron and 5 microns over a plant producing substrate; or the presence of colored particles in an amount so the that spectrum of light or heat exchange is altered with the composition of Levy and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Levy broadly teaches using the same materials in the same amounts so the film of the proper thickness and light and heat exchange would be the same. Since a hydrophobic kaolin, limestone, etc... is taught and Applicant teaches hydrophobic kaolin and limestone in claims 68 and 69 then it intrinsically has a block brightness of at least 80 or

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at least 90. "A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

2. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add calcined clays, as suggested by Purterka et al., to the composition of Levy and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Levy broadly teaches using clays as the carrier material and Purterka et al. teach using various calcined clays for the same purpose. "It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980).

3. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to various colorants to the composition of Levy and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Levy teaches adding dyes and metal oxides to the composition (see claim 1 lines 45-46 and claim 14, line 43). It is merely judicious selection of a metal oxide or dye to add to the composition by one of ordinary skill in the art absent evidence to the contrary especially when Levy teaches that any art equivalent will work and McAllister teaches

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the equivalence of titanium oxide and iron oxide. "It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980).

4. It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to add various ionic salts, as suggested by Walker, to the composition of Levy and produce the instant invention.

One of ordinary skill in the art would have been motivated to do this because Levy teaches adding pesticides/herbicides to the composition thus making it an agricultural composition and Walker teaches that these are components to agricultural compositions. "It is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980). In light of the forgoing discussion, the Examiner concludes that the subject matter defined by the instant claims would have been obvious within the meaning of 35 USC 103(a).

From the teachings of the references, it is apparent that one of ordinary skill in the art would have had a reasonable expectation of success in producing the claimed invention. Therefore, the invention as a whole was *prima facie* obvious to one of

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ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in the absence of evidence to the contrary.

Response to arguments:

Applicant asserts that titanium oxide is not a colored particle and uses a definition of titanium oxide as a pigment as proof that it is not colored. This is an interesting argument. On the one hand, one can select a titanium dioxide pigment to color a cloud in a piece of art and so in that sense it is a color but, on the other hand, in reviewing the formal definition of "white" it does mean the absence of color. In this respect, the Examiner believes Applicant is correct. However, in the rejection above the primary reference teaches art equivalents of the white pigment and the art establishes the equivalence of titanium oxide and iron oxide which is colored by Applicant's definition.

Furthermore, all the elements claimed are also known in the art and would be expected to function in the same way. Kaolin functions as kaolin, oil functions as oil, and iron oxide functions as iron oxide. All Applicant has done is assemble known elements in the art into one composition. This is relevant to commercial success not invention. (See *ANDERSON'S-BLACK ROCK, INC., Petitioner, v. PAVEMENT SALVAGE CO.*, U.S.P.Q. 673, 396 U.S. 57, 90 S.Ct. 305, 24 L.Ed.2d 258, 163). Applicant has not argued synergy.

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Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 3-11, 46, 47, 50-54 and 66-73 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 7-9 and 11-26 of U.S. Patent No. 7,018,643 in view of Jackson et al. (US 2,821,500), McAllister et al. (US 5130342), and Walker (US 6,110,866). Although the conflicting claims are not identical, they are not patentably distinct from each other because the subject matter of the instant invention embraces or is embraced by the subject matter disclosed in the patent. The patent discloses a pesticide delivery system that forms a continuous film having a thickness from about 1 micron to about 1000 microns comprising at least 90% of the particulate material has a particle size of less than 10 microns, for example, calcined kaolin (claim 1) with a continuous film of a hydrophobic

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outer surface of modified silicone fluids and fatty acids (claim 8) and further comprising surfactants and other agents such as pest control agents (claims 1, 9 and 11). The particulate material can further comprise titanium dioxide as well as the plant producing media diatomaceous earth (claim 16).

The patent does not expressly disclose a composition where the particulate material has a particle size of about 10 microns or less or is in the form of a powder, slurry or emulsion or comprises various known plant fertilizer salts, colored particles and plant producing media. However, the claim language is open for including other ingredients.

One of ordinary skill in the art would have recognized that “at least 90%” would include 100% of the particles and the system must have some form whether that is as a dry powder or slurry/dispersion/emulsion in aqueous media and therefore read on the instant invention. Adjustment of film thickness size is merely optimization of the film. The addition of known components and equivalents, such as the equivalent of titanium oxide is iron oxide, of agricultural compositions, as taught by Jackson et al., McAllister et al., and Walker, is prima facie obvious in the absence of evidence to the contrary.

Response to arguments:

Applicant's arguments have been considered but are not found to be persuasive.

Conclusion

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernst V. Arnold whose telephone number is 571-272-8509. The examiner can normally be reached on M-F (6:15 am-3:45 pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Ernst V Arnold/
Examiner, Art Unit 1616